NO. 92-701

FILED
OCT 19 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

ESTHER PRINCE
PETITIONER

VS.

HOFFMAN-LA ROCHE, INC.
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WM. ROBERTS WILSON, JR.
WM. ROBERTS WILSON, JR., P.A.
654 NORTH STATE STREET
JACKSON, MISSISSIPPI 39202
(601) 948-1111
COUNSEL OF RECORD

OF COUNSEL:
MITCHELL H. TYNER
RONALD C. MORTON
WM. ROBERTS WILSON, JR., P.A.
654 NORTH STATE STREET
JACKSON, MISSISSIPPI 39202
(601) 948-1111

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit deny the Petitioner her right to due process of law protected under the Fourteenth Amendment of the United States Constitution when it failed to follow the law of Mississippi as declared by the Mississippi Supreme Court, and ruled instead that foreign plaintiffs could not use the "doing business" prong of Mississippi's Long Arm Statute to sue foreign, non-registered defendants in Mississippi.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in its refusal to certify to the Mississippi Supreme Court, the issue of "Whether a foreign plaintiff can utilize the 'doing business' prong of Mississippi's Long Arm Statute to sue foreign, non-registered defendants in Mississippi Courts."

3. Whether the United States Court of Appeals for the Fifth Circuit abused its discretion in its refusal to consider a lower Mississippi State Court's holding as to the proper application of the "doing business" prong of Mississippi's Long Arm Statute, thus violating the Petitioner's rights of due process under the Fourteenth Amendment to the United States Constitution.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Esther Prince and the Respondents Hoffman-La Roche, Inc. The Honorable Lee Davis Thames, J. Carter Thompson, Jr., and William M. Gage, served as attorneys for Hoffman-La Roche, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. Despite the fact that the Mississippi Supreme Court's opinion in *Shewbrooks v. AC&S, Inc.* is dispositive of the issue of interpreting the Mississippi Long Arm Statute, presented before the United States Court of Appeals for the Fifth Circuit, the Circuit Court refused to acknowledge or follow *Shewbrooks* 5

II. The United States Court of Appeals for the Fifth Circuit did not remain faithful to its self-imposed standards of review in refusing to certify the jurisdiction question to the Mississippi Supreme Court, or alternatively to defer to the holding of a lower Mississippi State Court considering the same issue 10

CONCLUSION 14

APPENDIX A-1

TABLE OF AUTHORITIES

CASES **Page**

Alexis v. AC&S, Inc., Hinds County Docket No. 91-69-404 12

Arrow Food Distributors v. Love, 361 So. 2d 324 (Miss. 1978) 8

Breland v. Hideaway Lake, Inc., 585 F.2d 716, 719-21 (5th Cir. 1978) 7

Commissioner of Internal Revenue v. Estate of Bosh, 387 U.S. 456 (1967) 7

Deshotels v. SHRM Catering Service, Inc., 842 F.2d 116 (5th Cir. 1988) 11,12

Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938) 7

Exxon Company U.S.A. v. Banque de Paris, 874 F.2d 235 (5th Cir. 1989) 11

Fidelity Union Trust Co. v. Field, 311 U.S. 167 (1940) 13

Golden v. Cox Furniture Manufacturing Co. Inc., 683 F.2d 115 (5th Cir. 1982) 6

Herrley v. Volkswagen, 957 F.2d 216 (5th Cir. 1992) . . . 7

Jackson v. Johns Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986) 13

TABLE OF AUTHORITIES (continued)

CASES	Page
King v. United Commercial Travelers, 333 U.S. 160 (1947)	13
Lamarque v. Massachusetts Indemnity Life Insurance Co., 794 F.2d 194 (5th Cir. 1986)	13
Lehman v. Schein, 416 U.S. 386 (1974)	11
Manookian v. A.H. Robins Company, 760 F.2d 567 (5th Cir. 1985)	11
Mills v. Dieco, Inc., 722 F. Supp 296 (N.D. Miss. 1989)	7,8
Mladinich v. Kohn, 185 So. 2d 481 (Miss. 1966)	10
Pacific Lining Co. v. Algenon Blair Construction Co., 812 F.2d 237 (5th Cir. 1987)	11,12
Puckett v. Rufenacht, Vromagen & Hertz, Inc., 903 F.2d 1014 (5th Cir. 1990)	11,12
Puckett v. Rufenacht, Vromagen & Hertz, Inc. 919 F.2d 992 (5th Cir. 1990)	11,12
Sea First Commercial Corp. v. United States Fidelity and Guaranty Co., 780 F.2d 1290 (5th Cir. 1986)	13
Shewbrooks v. AC&S, Inc., 529 So. 2d 557 (Miss. 1988)	5,6,7,8

TABLE OF AUTHORITIES (continued)

CASES **Page**

Smith v. Dewalt Products Corp., 743 F.2d 277, 279 (5th Cir. 1984) 6,9

Southern Pacific Transportation Co. v. Dudley Wayne Fox, Cause No. 89-CA-381 (Pending Rehearing) 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ESTHER PRINCE
PETITIONER

VS.

HOFFMAN-LA ROCHE, INC.
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Esther Prince, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above and titled proceeding on May 28, 1992, and reaffirmed by its denial of Petition for Rehearing on July 21, 1992.

OPINIONS AND DENIAL OF PETITION FOR REHEARING BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not reported but is reprinted in the Appendix hereto, P. A-13, *infra*. The Court of Appeals' denial of Petition for Rehearing is represented in the Appendix hereto, P. A-17, *infra*.

The memorandum decision of the United States District Court for the Southern District of Mississippi is reported at 780 F. Supp. 417 (S.D. Miss. 1992). It is reprinted in the Appendix hereto, P. A-1, *infra*. The memorandum decision of the United States District Court for the Southern District of Mississippi denying Petitioners' Motion for Reconsideration has not been reported. It is reprinted in the Appendix hereto, P. A-10, *infra*.

JURISDICTION

Invoking federal diversity jurisdiction under 28 U.S.C. § 1332, the Petitioner brought this suit in the Southern District of Mississippi. On December 31, 1991, a Rule 54(b) Final Judgment was entered in favor of Respondent Hoffman-La Roche, Inc., by the District Court. Appeal was made as of right under 28 U.S.C. §§ 1291, 1332, and Fed. R. App. P. 4. On Respondents' appeal, the Fifth Circuit, on May 28, 1992, affirmed the District Court's decision. A timely Petition for Rehearing was filed, and on July 21, 1992, the Petition for Rehearing was denied.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Miss. Code Ann. § 13-3-57 (Supp. 1990). Service when Defendant is nonresident doing business in state; appointment of Secretary of State as agent.

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a

resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act be deemed equivalent to the appointment by such nonresident of the secretary of state of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their or its agent, servant or employee...

Miss. Code Ann. § 79-1-27 (repealed effective January 1, 1988).

Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not...

STATEMENT OF THE CASE

On April 19, 1991, Petitioner, Esther Prince, filed in United States District Court for the Southern District of Mississippi, Southern Division, a complaint againt Respondent, Hoffman-La Roche, Inc., a drug manufacturer, to recover from injuries caused by Respondent's defective chemical product, Fansidar. Specifically alleged as grounds for recovery were breach of express warranty, breach of implied warranty, and strict liability. This claim arose from Esther Prince's purchase and ingestion of the Respond-

ent's drug, Fansidar, between October 1984 and September 1985. As a direct and proximate result of Roche's defective product, Prince suffered cirrhosis of the liver, and was severely and permanently incapacitated and disabled. Esther Prince has had to undergo multiple liver transplants and incurred monumental medical expenses for this treatment. Prince, a Pennsylvania resident, sought relief against Respondent, Hoffman-La Roche, Inc., in the State of Mississippi where Roche was and is engaged in substantial and continuous business transactions.

Specifically, Prince utilized Mississippi's Long Arm Statute, Miss. Code Ann. § 13-3-57 and Mississippi's Foreign Corporations Statute, Miss. Code Ann. § 79-1-27, in order to effect jurisdiction over the Respondent. On July 26, 1991, Roche moved for dismissal of the cause, arguing that the "doing business" prong of Miss. Code Ann. § 13-3-57, and Mississippi's Foreign Corporations Statute, Miss. Code Ann. § 79-1-27, could not be utilized by an out of state plaintiff to perfect jurisdiction over a foreign defendant. On September 27, 1991, Roche's Motion to Dismiss was granted. On October 10, 1991, Prince filed a Motion to Reconsider, which was denied by the Court on December 26, 1991. On December 31, 1991, a Rule 54(b) Final Judgment was rendered against Appellant, Prince, and on January 23, 1992, Prince filed her motion to Appeal before the United States Court of Appeals for the Fifth Circuit. On May 28, 1992, the Fifth Circuit affirmed the District Court's ruling. Petitioner timely filed with the Fifth Circuit, a Petition for Rehearing, and a Suggestion for Rehearing En Banc, both of which were denied on July 21, 1992. Petitioner now seeks a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, as sensitive review would appear to require that this Court correct Fifth Circuit's erroneous application of Mississippi law.

REASONS FOR GRANTING THE WRIT

1. Despite the fact that the Mississippi Supreme Court's opinion in *Shewbrooks v. AC&S, Inc.*, is dispositive of the issue of interpreting the Mississippi Long Arm Statute, presented before the United States Court of Appeals for the Fifth Circuit, the Circuit Court refused to acknowledge or follow *Shewbrooks*.

In a 1988 landmark jurisdictional decision, the Mississippi Supreme Court ruled in *Shewbrooks v. AC&S*, 529 So. 2d 557 (Miss. 1988) that an out of state plaintiff is free to utilize the "doing business" prong of Mississippi's Long Arm Statute, Miss. Code. Ann. § 13-3-57, when suing an out of state defendant in a Mississippi forum. In *Shewbrooks*, a Delaware resident was permitted to recover in a Mississippi forum, from eighteen out of state defendants, seven of which were not registered to do business in the State of Mississippi. *Id.* at 569 (Robertson, J., dissenting). There was no evidence that the *Shewbrooks* plaintiffs had ever set foot in Mississippi. *Id.* at 574 (Anderson, J., dissenting). The suit was brought in Mississippi because the statute of limitation against the defendants had run in the plaintiffs home state of Delaware. The Mississippi Trial Court dismissed the defendants for lack of personal jurisdiction and *forum non convenes*. However, in a *en banc* decision, the Mississippi Supreme Court reversed the trial court's decision and summarily dispensed with the fallacy that an out of state plaintiff cannot utilize Mississippi's Long Arm jurisdictional statute.

> There is no serious contention on appeal that the Circuit Court lacked personal jurisdiction of the defendants, all of which do business in Mississippi and are subject to process in this state. This ground of dismissal needs little discussion.

> The fact that a plaintiff and a defendant are nonresidents of a state in a transitory cause of action which accrued in another state does not, in and of itself, deprive a court of lawful authority (i.e. "jurisdiction") to hear the case, and this is universally recognized by all courts.

Id. at 559.

The Mississippi Supreme Court then stated in unequivocal terms that Mississippi's Long Arm Statute reaches foreign, nonregistered defendants:

> The only restriction placed on states in hearing out of state claims is the constitutional limit placed on our long arm statute. So long as an out of state litigant has enough minimum contacts in Mississippi so that the maintenance of a suit "does not offend the taditional notions of fair play and substantial justice," our court have the power to hear a suit. So long as the case falls within the prescribed period of when a suit can be brought, our courts must hear the action.

Id. at 565 (citations omitted). Despite the fact that the plaintiffs were residents of Delaware and had never set foot in Mississippi, the Mississippi Supreme Court held that these plaintiffs were lawfully able to utilize Mississippi's Long Arm jurisdictional statute to reach foreign, nonregistered defendants.

Prior to the *Shewbrooks* decision, numerous Federal Court decisions held that an out of state plaintiff could not utilize the "doing business" prong of Miss. Code Ann. § 13-3-57 to reach foreign defendants. *See e.g. Smith v. Dewalt Products Corp.*, 743 F.2d 277, 279 (5th Cir. 1984); *Golden v. Cox Furniture Manufacturing Co. Inc.*, 683 F.2d

115, 117 (5th Cir. 1982); *Breland v. Hideaway Lake, Inc.*, 585 F.2d 716, 719-21 (5th Cir. 1978). These Federal Court rulings were perfectly permissible, as pre-*Shewbrooks, Erie* "guesses" as to what the Mississippi Supreme Court would do given the opportunity to rule upon this jurisdictonal issue. *See Commissioner of Internal Revenue v. Estate of Bosh*, 387 U.S. 456 (1967).

After the Mississippi Supreme Court's ruling in *Shewbrooks v. AC&S* however, Mississippi's Federal Courts no longer had the luxury of "guessing" as to how Mississippi would decide the issue. The issue had been decided, and *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938) and its progeny commands that Mississippi's Federal judiciary follow the Mississippi Supreme Court's interpretation of Mississippi's law. This the Mississippi Federal Courts, and the Fifth Circuit, have failed to do. *See e.g. Herrley v. Volkswagen*, 957 F.2d 216 (5th Cir. 1992); *Mills v. Dieco, Inc.*, 722 F. Supp 296 (N.D. Miss. 1989).

The Fifth Circuit and Mississippi Federal Courts' refusal enlarge the jurisdictional application of § 13-3-57 is based upon a belief that, had the Mississippi Supreme Court truly intended to apply the "doing buiness" prong of § 13-3-57 the court would have explicitly stated that it was overruling the long federal precedent to the contrary.

> The plaintiffs content that the case of *Shewbrooks v. AC&S, Inc.* opened the Mississippi Long Arm Statute's "doing business" provision to nonresident plaintiffs and dissolved the statute's nexus requirement. While their argument in innovative, the Court declines to adopt their interpretation of the *Shewbrooks* decision.

> The *Shewbrooks,* nonresident plaintiffs filed suit in Mississippi against foreign corporations for a cause of action which occurred outside Mississippi. The court held that personal jurisdiction existed over the defendants; however, the opinion does not disclose the basis on which personal jurisdiction was obtained. The *Shewbrooks* opinion expressly states only that nonresident parties and a cause of action which occurs out of the state are not factors which, in and of themselves, "deprive a court of lawful authority to hear [a] case." Apparently, in *Shewbrooks* the long arm statute was not used to obtain personal jurisdiction. The statute was not cited and cases construing the "doing business" provision also were conspicuously absent. Indeed, the court noted there was "no serious question on appeal" that personal jurisdiction existed over the defendants. Based on the foregoing factors, the court does not consider *Shewbrooks* a personal jurisdiction case which invalidates well established state and federal precedent and construes the long arm statute contrary to its plain meaning.

Mills, 722 F. Supp. at 296 (citations omitted).

However, there were only two methods of obtaining jurisdiction available to the *Shewbrooks* plaintiffs: the doing business prong of Miss. Code Ann. § 13-3-57, and the Mississippi Foreign Corporations Statute, § 79-1-27. Regardless of which of these statutes the *Shewbrooks* court used in exercising jurisdiction over the foreign defendants, the effect of the *Shewbrooks* opinion was to open both statutes to use by nonresident plaintiffs. Both §§ 13-3-57 and 79-1-27 must be read in "harmony." *Arrow Food Distributors v. Love,* 361 So. 2d 324 (Miss. 1978). Even if the Mississippi Federal Courts were correct, and *Shewbrooks* did not apply § 13-3-57, the ultimate result of

the *Shewbrooks* decision was still to make § 13-3-57 available to use by out of state plaintiffs. Sections 13-3-57 and 79-1-27 "must be construed together and harmonized together." *Smith v. Dewalt Products Corp.*, 743 F.2d 722 (5th Cir. 1984). Therefore, if a nonresident plaintiff was precluded from using one, i.e. § 13-3-57, he was likewise precluded from using the other, i.e. § 79-1-27. *Id.* Following the court's logic in *Smith*, one must also say that these two statutes must remain in harmony. To say that *Shewbrooks* permitted a nonresident plaintiff to sue an out of state defendant under § 79-1-27, then it logically follows that the same door must be opened to nonresident plaintiffs utilizing the doing business prong of § 13-3-57. If a nonresident plaintiff can utilize § 79-1-27, then that same nonresident plaintiff can also utilize § 13-3-57; to hold otherwise would be to create disharmony between the statutes. *See Smith v. Dewalt Products.* 743 F.2d 722.

Additionally, even though § 79-1-27 was repealed by the Mississippi Legislature effective 1988, the very terms of this jurisdictional statute remain applicable to the instant case. Ms. Prince's cause of action accrued prior to the repeal of § 79-1-27, and as such the provisions of this statute remain in full force and effect as to her claim. Under the Mississippi Code, changes in a statute do not operate to change any rights which have previously accrued. Likewise, new statutes are construed as having only a prospective, and not a retroactive effect, unless the purpose and intention of the legislature is clearly expressed to give a retroactive operation. Miss. Code Ann. § 1-1-21 (1972).

Under the Mississippi Code, any right which accrued prior to 1988 would be governed by the Miss. Code Ann. § 79-1-27. Section 1-1-21 clearly manifests an intent on the part of the Mississippi legislature to apply amendments, repeals, and changes in the code *prospectively* rather than

retroactively.

Commentators on this issue likewise agree that retroactive operation of statutes is not favored by courts, and laws will not be construed as retroactive unless the legislature intended such an application. Singer, *Statutes and Statutory Construction*, Vol. 2, pp. 348-49; *see also Mladinich v. Kohn*, 185 So. 2d 481 (Miss. 1966).

Both the District Court, and the Fifth Circuit Court of Appeals, totally ignored the Petitioner's attempt to exercise her jurisdictional rights under § 79-1-27. The courts further failed to give any attention whatsoever to Petitioner's argument that § 79-1-27 and § 13-3-57 must remain in harmony, in light of the *Shewbrooks* decision.

Thus, the Fifth Circuit in its failure to address these arguments, has created discord between application of jurisdictional statutes in Mississippi's State Courts, and application of these same statutes in Mississippi's Federal Courts. Two separate lines of law presently seem to exist in Mississippi, which will encourage forum shopping between the Federal and State judiciaries. Plenary consideration of the matter by this Court is essential.

II. The United States Court of Appeals for the Fifth Circuit did not remain faithful to its self-imposed standards of review in refusing to certify the jurisdiction question to the Mississippi Supreme Court, or alternatively to defer to the holding of a lower Mississippi State Court considering the same issue.

The Mississippi Supreme Court has provided a means whereby Federal Courts, when deciding dispositive questions or propositions of Mississippi Law on which there are no clear controlling Mississippi precedents, may

certify such questions or propositions of law to the Mississippi Supreme Court. Miss. S. Ct. R. 20. The Fifth Circuit Court of Appeals has, on many occasions, taken advantage of such certified question rules - a course of action which has been enthusiastically endorsed by this Honorable Court. *See e.g. Lehman v. Schein,* 416 U.S. 386 (1974); *Exxon Company U.S.A. v. Banque de Paris,* 874 F.2d 235 (5th Cir. 1989); *Manookian v. A.H. Robins Company,* 760 F.2d 567 (5th Cir. 1985). In fact, the Fifth Circuit Court of Appeals in *Manookian v. A.H. Robins Company* certified to the Mississippi Supreme Court, the exact issue raised in the instant case; that is, whether a foreign plaintiff can utilize Mississippi's jurisdictional statutes to reach foreign nonresident defendants. The Mississippi Supreme Court was unable to answer the question when it was certified in *Manookian,* due to a stay imposed by a U.S. Bankruptcy Court during the entire time that certification was pending.[1]

In deciding to certify cases to state Supreme Courts, the Fifth Circuit has applied a two tier analysis, neither tier of which was applied in the instant case. The Fifth Circuit has stated that it will consider: (1) the absence of sufficiently clear precedence and the danger of pronouncing the result that the state Supreme Court would later not follow; and (2) whether the issue was "important and unsettled." *Deshotels v. SHRM Catering Service, Inc.,* 842 F.2d 116, 119 (5th Cir. 1988); *Puckett v. Rufenacht, Vromagen & Hertz, Inc.,* 919 F.2d 992, 993 (5th Cir. 1990) (*Puckett v. Rufenacht, Vromagen & Hertz Inc.,* 903 F.2d 1014, 1021 (5th Cir. 1990); *Pacific Lining Co. v. Algenon Blair Construction Co.,* 812 F.2d 237, 242 (5th Cir. 1987)).

---

[1] The *Manookian* case was subsequently settled with the bankruptcy trustee pior to the stay being lifted, and thus the Mississippi Supreme Court was ousted of jurisdiction over the question certified to it.

Rather than apply its self-imposed standards to determine whether the question presented in the instant case is one properly to be certified to the Mississippi Supreme Court, the Fifth Circuit Court of Appeals instead simply refused to even consider certifying the question, stating only "we decline to [certify this question to the Mississippi Supreme Court] because of the well established line of federal authority answering the question at hand." P. A-14, *infra*. Although the Petitoner has never denied that a long line of federal authority exists ruling *contra* to Petitioner's position on this jurisdictional issue, erroneous federal authority is irrelevant to the issue of certifying questions to the Mississippi Supreme Court. In deciding to certify questions, the Fifth Circuit has held that the proper considerations are the absence or ambiguity of state authority, not federal authority. *Deshotels*, 842 F. 2d 116; *Puckett*, 919 F.2d 992; *Pacific Lining Co.*, 812 F. 2d 237. The Fifth Circuit's refusal to certify because of the "well established line of federal authority answering the question at hand" was in fact contrary to this Court's mandate in *Erie* and its progeny.

Additionally, the very issues raised before the Fifth Circuit Court of Appeals in this case have been taken under submission by one of the Circuit Courts of the State of Mississippi, and will undoubtedly, unless settled, be decided by the Supreme Court of Mississippi. The results of these decisions will be available to Esther Prince, so long as this case is not disposed of. The pending case of *Alexis v. AC&S, Inc.*, Cause No. 91-69-404, Circuit Court of Hinds County, was brought to the Fifth Circuit's attention, and a request was made that the Fifth Circuit stay Ms. Prince's case pending the outcome of *Alexis*. Since filing her Petition for Rehearing, an additional case dealing with these precise issues, *Southern Pacific Transportation Co. v. Dudley Wayne Fox*, is likewise now pending before the

Supreme Court of the State of Mississippi as a Petition for Rehearing. Deference to these Mississippi State Courts opinions is all together proper, and under this Honorable Court's guidance in *Fidelity Trust Co. v. Field*, 311 U.S. 167 (1940), it is meet, right, and perhaps the bounded duty of the Fifth Circuit, at a bare minimum, to consider the holding of the highest court in Mississippi on an interpretation of state law, even when that highest court is not the state's Supreme Court. *See also King v. United Commercial Travelers*, 333 U.S. 160 (1947); *Lamarque v. Massachusetts Indemnity Life Insurance Co.*, 794 F.2d 194, 196 (5th Cir. 1986); *Sea First Commercial Corp. v. United States Fidelity and Guaranty Co.*, 780 F.2d 1290, 1295 (5th Cir. 1986); *Jackson v. Johns Manville Sales Corp.*, 781 F.2d 394, 397 (5th Cir. 1986).

In light of the fact that both the Mississippi Supreme Court, and the Circuit Court for the First Judicial District of Hinds County, Mississippi, are presently considering, and will likely render an intervening decision on this very narrow and precise issue, the Fifth Circuit Court of Appeals should properly have granted Prince's Petition for Reconsideration and at a bare minimum, held Petitioner's case in abeyance until one of the Mississippi State Courts had rendered its opinion. The Fifth Circuit's failure to do so has tended to greatly increase the likelihood of disharmony between federal and state courts' application of state law, thus encouraging forum shopping between state and federal courts. Accordingly, consideration of the matter by this Court is necessary.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. Despite the Mississippi Supreme Court's clear ruling that foreign plaintiffs can sue foreign defendants doing business in the State of Mississippi, pursuant to Mississippi law, the Fifth Circuit Court of Appeals has totally disregarded Mississippi's pronouncement of Mississippi law, and instead continued to apply pre-*Shewbrooks, Erie* "guesses" as to what Mississippi law should be. Plenary consideration of the matter by this court is thus essential.

RESPECTFULLY SUBMITTED,

WM. ROBERTS WILSON, JR.
WM. ROBERTS WILSON, JR., P.A.
654 NORTH STATE STREET
JACKSON, MISSISSIPPI 39202
(601) 948-1111

COUNSEL OF RECORD

OF COUNSEL:

MITCHELL H. TYNER
RONALD C. MORTON
WM. ROBERTS WILSON, JR., P.A.
654 NORTH STATE STREET
JACKSON, MISSISSIPPI 39202
(601) 948-1111

FRIELANDER, FRIELANDER, REIZES,
JOCH, & LITTMAN, P.C.
425 PARK AVENUE
WAVERLY, NEW YORK 14892

CERTIFICATE OF SERVICE

I, Wm. Roberts Wilson, Jr., a member of the bar of this Court, hereby certify that on this 19th day of October, 1992, three copies of the Petition for Writ of Certiorari in the above entitled case were mailed, first class postage prepaid, to J. Carter Thompson, Esq., Butler, Snow, O'Mara, Stevens & Cannada, 17th Floor, Deposit Guaranty Plaza, Post Office Box 22567, Jackson, Mississippi, 39225-2567, counsel for all the Respondents herein. I further certify that all parties required to be served have been served.

WM. ROBERTS WILSON, JR.
WM. ROBERTS WILSON, JR., P.A.
654 NORTH STATE STREET
JACKSON, MISSISSIPPI 39202
(601) 948-1111

APPENDIX A

Esther PRINCE,
Plaintiff,

v.

F. HOFFMAN-LA ROCHE & CO., L.C.
Hoffman-La Roche, Inc. and
Roche Biomedical Laboratories, Inc.,
Defendants.

Civ. A. No. S91-0174(R).

United States District Court,
S.D. Mississippi, S.D.

Sept. 26, 1991.

Pennsylvania citizen filed suit against Swiss pharmaceutical manufacturer, alleging that she sustained personal injuries as result of her purchase of manufacturer's drug in one country and ingestion of it in another country. Manufacturer moved to dismiss summons and complaint for insufficient service of process and lack of personal jurisdiction. The District Court, Dan M. Russell, Jr., J., held that: (1) nonresident plaintiff could not use "doing business" prong of long-arm statute to obtain in personam jurisdiction over nonresident defendant, and (2) assuming that it was otherwise available, repealed statute making nonresident corporations found to be doing business in Mississippi subject to suit there to the same extent as Mississippi corporations also did not provide basis for assertion of personal jurisdiction.

Motion granted.

Mitchell H. Tyner, William Roberts Wilson, Jr., P.A., Jackson, Miss., for plaintiff.

J. Carter Thompson, Jr., Butler, Snow, O'Mara, Stevens & Cannada, Jackson, Miss., for defendants.

MEMORANDUM ORDER

DAN M. RUSSELL, Jr., District Judge.

This cause is before this Court on a Motion by Defendant Hoffman-La Roche, Inc. (hereinafter "La Roche" to Dismiss the plaintiff's summons and complaint for insufficient service of process and lack of personal jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(2) and 12(b)(5).

FACTS

On April 19, 1991, the plaintiff, Esther Prince (hereinafter "Prince"), filed her complaint in this Court.

By her complaint, Prince alleges that she is a citizen of Pennsylvania and that the defendant, F. Hoffman-La Roche & Co., L.C., is a resident corporation of Switzerland; and the defendants, Hoffman-La Roche, Inc. and Roche Biomedical Laboratories, Inc., are resident corporations of New Jersey. The plaintiff further alleges that each defendant has its principal place of business in a state other than Pennsylvania.

In the complaint the plaintiff alleges that each of these defendants designed, manufactured, marketed, produced and distributed for resale to the general public a certain drug known as Fansidar for oral consumption.

The plaintiff alleges, relying upon the defendants' ex-

press and implied warranties that Fansidar was a safe prophylactic against malaria, that she purchased and ingested the drug resulting in disability.

Although the plaintiff maintains that these defendants were, al all times relevant, doing business in the State of Mississippi, she also alleges that she purchased the Fansidar in British Hong Kong and ingested it in the People's Republic of China from October, 1984 to July, 1985, and in the Commonwealth of Pennsylvania in August, 1985 and September, 1985.

Defendant Roche Biomedical Laboratories, Inc. moved for summary judgment, which motion was granted by this Court on June 27, 1991.

Defendant F. Hoffman-La Roche & Co., L.C., has apparently not been served with process as of the date of this Memorandum Order.

DISCUSSION

As it is uncontested that neither the plaintiff nor the defendant, La Roche, is a resident of the State of Mississippi, and that the defendant is not qualified to do business in Mississippi, the dispositive issue before this Court is whether this Court can obtain personal jurisdiction over La Roche.

Citing *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 491 (5th Cir.1989), and *Williams v. Taylor Machinery, Inc.*, 529 So.2d 606 (Miss.1988), the defendant correctly asserts that in order for this Court to obtain personal jurisdiction over La Roche (1) there must be a Mississippi statute conferring such jurisdiction; and (2) the exercise of such jurisdiction must comport with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

[1] The primary statute which is applicable herein is Mississippi's long-arm statute, Miss.Code Ann. § 13-3-57 (Supp.1991), which provides in pertinent part as follows:

> Any ... foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of state of the State of Mississippi ... to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceeding accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their or its agent, servant or employee.

As it is clear and uncontested that neither the "contract" nor the "tort" prongs of the long-arm statute are relevant to this cause, the only question is whether the "doing business" prong is available to this plaintiff.

Citing abundant authority, including *Smith v. DeWalt Products Corp.*, 743 F.2d 277 (5th Cir.1984), and *Goodman v. Hoffman-La Roche, Inc.*, C.A. No. J89-0649(B) (S.D.Miss. Jan. 9, 1990), both parties agree that the Fifth Circuit and the district courts of this state have consistently held that a non-resident plaintiff cannot use the "doing business" prong of the long-arm statute to obtain inpersonam jurisdiction over a non-resident defendant.

The argument of this plaintiff, which has been offered before to the courts of this district, is that the Mississippi Supreme Court in *Shewbrooks v. A.C. & S., Inc.*, 529 So.2d 557 (Miss.1988), indicated that non-resident plaintiffs are free to sue non-resident defendants under said "doing business" prong.

As recent as April 2, 1991, Judge Walter J. Gex, III stated in the consolidated case *Stanley Black, et al. v. Carey Canada, Inc., et al.*, C.A. No. S89-0470(G), slip op. at 5 (S.D.Miss. April 2, 1990), that "a non-resident plaintiff may not use the 'doing business' provision of the Mississippi long-arm statute."

Previously in *James B. Acker, et al. v. Armstrong World Industries, Inc., et al.*, C.A. No. S89-0563(L), slip op. at 9, 1989 WL 268344 (S.D.Miss. December 2, 1989), Judge Gex, citing to *Shover v. Cordis Corporation*, C.A. No. J89-0443(W) (October 25, 1989), set out:

> If the *Shewbrooks* court really intended the 'doing business' provision of the Mississippi long-arm statute to be made available to non-resident plaintiffs, this Court is confident they would have at least cited the statute somewhere in their opinion. Also, this Court is persuaded that if the Mississippi Supreme Court meant what plaintiffs contend they did, then that court would have cited the numerous federal court cases that have held otherwise, as having erred in their Erie guesses. Therefore, *Shewbrooks* did not change the prior rule that non-residents may not obtain service of process pursuant to the 'doing business' provision of the Mississippi long-arm statute. *Shover, supra*, at 3-4.

[2] The plaintiff also argues that even if this Court rejects a reading of *Shewbrooks* which would make the "doing business" prong available, this Court would have to accept *Shewbrooks* as authority for jurisdiction under Miss.Code Ann. § 79-1-27 (Supp.1986) (repealed effective Jan. 1, 1988), which provided that:

> Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not.

The defendant argues in part that as the civil action was not begun until after the subject statute was repealed, the plaintiff may not rely upon it notwithstanding the allegations that the cause of action accrued prior to the repeal.

This Court, without deciding, accepts *arguendo* that § 79-1-27 is otherwise available; however, this Court agrees with the court of appeals in *Smith v. DeWalt Products Corporation*, 743 F.2d 277 (5th Cir.1984), wherein it is summarized:

> First, the Mississippi Supreme Court has held that, in a situation such as this, Miss.Code Ann. § 79-1-27 (1972) and the long-arm statute must be construed together and harmonized. This court of course follows that construction of Mississippi law, but in the instant case, the only manner in which these two provisions can be harmonized is to refuse to extend personal jurisdiction over DeWalt. As already noted, when the

> Mississippi legislature amended the long-arm statute in 1980, it did not extend the 'doing business' provision of that statute to non-resident plaintiffs. To extend jurisdiction over DeWalt on the authority of § 79-1-27, therefore, would be completely contrary to the intent of the Mississippi legislature. (footnotes omitted).

Id. at 281.

This Court also finds support in *Schmid v. Roehm GmbH,* 617 F.Supp. 655 (D.C.Miss. 1985), wherein Judge William H. Barbour, Jr. set out:

> *Miss.Code Ann.* § 79-1-27 has not been construed to authorize the assertion of jurisdiction over suits brought by non-resident plaintiffs against non-qualified/non-resident corporations. *See Smith v. DeWalt,* 743 F.2d 277, 281 (5th Cir.1984). While a good deal of confusion has been generated by the Mississippi Supreme Court's statement that § 79-1-27 and the long arm statute must be construed together and harmonized, *see Arrow Foods Distributors, Inc. v. Love,* 361 So.2d 324, 377 (S.D.Miss. 1978), no court has yet interpreted that statement to mandate an enlargement of the jurisdiction authorized by the long arm statute. The Court of Appeals for the Fifth Circuit has recently certified a question to the Mississippi Supreme Court dealing with this issue, *see Manookian v. A.H. Robins Company, Inc.,* 760 F.2d 567 (5th Cir.1985), but Plaintiff incorrectly assumes that resolution of that question would be dispositive in the instant case.
>
> The question certified to the Mississippi Supreme Court in *Manookian* is 'whether a non-

> resident plaintiff asserting a cause of action based upon a tort which wholly occurred outside of the State of Mississippi can rely on *Miss.Code Ann.* § 79-1-27 (1972) to secure jurisdiction over a foreign corporation which *does business* in Mississippi but is exempt from the qualification requirements.' 760 F.2d at 567. (emphasis added). The issue thus framed presupposes that the corporation meets the 'doing business' provision of the statute. As hereinafter stated, the Defendants in the instant case are not doing business in Mississippi.

Id. at 657-658.

In both *DeWalt* and *Schmid, supra*, the courts were able to buttress their opinions with a separate finding that the defendants were not doing business; a finding which this Court declines to make at this time.

Having discovered that, due to factors not related to the issues certified, the Mississippi Supreme Court did not proceed to a determination of the question in *Manookian*, this Court nevertheless opines that it would be inconsistent to allow the non-resident plaintiff to use § 79-1-27 to achieve a result which the Mississippi legislature eschewed when it amended the long-arm statute in 1980.

Finding, as it does, that there is no statutory basis for this Court to assert personal jurisdiction over La Roche, this Court finds it unnecessary to consider the defendant's federal due process argument. *See Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir.1985), and *McDaniel v. Ritter*, 556 So.2d 303 (Miss.1989).

Finally, as this Court bases its decision wholly upon the inability of a non-resident plaintiff to sue a non-resident

defendant under the "doing business" prong of the long-arm statute, this opinion does not address the defendant's argument of insufficiency of service of process.

IT IS THEREFORE ORDERED AND ADJUDGED that the defendant's Motion to Dismiss is hereby GRANTED.

SO ORDERED AND ADJUDGED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ESTHER PRINCE — PLAINTIFF

VERSUS — CIVIL ACTION NO. S91-0174(R)

F. HOFFMAN-LA ROCHE & CO., L.C.
HOFFMAN-LA ROCHE, INC. and ROCHE
BIOMEDICAL LABORATORIES, INC. DEFENDANTS

MEMORANDUM ORDER

This cause is before this Court on the plaintiff's Motion to Reconsider this Court's September 26, 1991 Memorandum Order dismissing the plaintiff's claim against Defendant Hoffman-La Roche, Inc. for lack of jurisdiction. Also before this Court is said defendant's Motion to Strike and Disregard Affidavits and Disregard Other Exhibits to Plaintiff's Motion for Reconsideration.

DISCUSSION

The plaintiff, Esther Prince, argues that the subsequent Motion to Reconsider is properly submitted pursuant to Fed.R.Civ.P. 59(e).

While duly noting the defendant's observation that the precise terminology of Rule 59(e) is "to alter or amend," this Court proceeds to the merits of the plaintiff's motion.

Judge William H. Barbour, Jr. in **Atkins v. Marathon LeTourneau Company**, 130 F.R.D. 625, 626 (S.D. Miss. 1990), set out as follows, to-wit:

> The Court here notes for purposes of clarification that it, as have other courts in the context of Rule 59(e) motions, recognizes only three possible grounds for any motion for reconsideration: (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, and (3) the need to correct a clear error of law or prevent manifest injustice. **Natural Resources Defense Council v. United States Envtl. Protection Agency**, 705 F.Supp. 698, 702 (D.D.C. 1989), **vacated on other grounds**, 707 F.Supp. 3 (D.D.C. 1989).

Since this Court's Memorandum Order of September 26, 1991, in the above styled civil action, there has not come to its attention any indication that the controlling law has been changed. Furthermore, notwithstanding the plaintiff's supplemental exhibits—whether or not properly submitted or admissible—the evidence which is relevant to this Court's prior decision has not substantially changed.

The sole basis of the plaintiff's Motion to Reconsider appears to be aimed at what she perceives to have been an error by this Court in the interpretation of Miss. Code Ann. Section 13-3-57 (1972 & Supp. 1991), in the wake of **Shewbrooks v. A.C. & S., Inc.**, 529 So. 2d 557 (Miss. 1988).

Having devoted no small increment of time and effort to the question of the non-resident plaintiff's right to use the "doing business" prong of the afore-cited Mississippi long-arm statute to effect jurisdiction by this court of a non-resident defendant, this Court stands by its original Order.

Finally, as pertains to the Motion to Reconsider, this court adopts the relevant language and authority of Judge Barbour speaking in **Liberty Mutual Ins. Co. v. Graves,**

C.A. No. J88-0535(B) (S.D. Miss. May 11, 1990), wherein he states the following, to-wit:

> With regard to the third ground [as enumerated in **Natural Resources, supra**] this Court is inclined to agree with the court in **Durkin v. Taylor,** 444 F.Supp. 879, 889 (E.D.Va. 1977), where the court stated that the proper recourse for a litigant who feels that the judgment of a court is based upon an erroneous view of the law is appeal, not re-argument.

Id. at 3.

In conclusion, regarding the defendant's Motion to Strike and Disregard the Plaintiff's Affidavits and Exhibits, having found these to be extraneous to this Court's decision on the underlying Motion, this Court finds said Motion to Strike and Disregard to be moot.

IT IS THEREFORE ORDERED AND ADJUDGED that the plaintiff's Motion to Reconsider is DENIED, and the defendant's motion is held to be moot.

SO ORDERED AND ADJUDGED this the 24th day of December, 1991.

/s/ Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7060
Summary Calendar

FILED
MAY 28 1992

ESTHER PRINCE,
Plaintiff-Appellant,

VERSUS

F. HOFFMAN-LA ROCHE & CO., L.C., et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA S91-0174(R)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

This appeal presents the question of whether an out-of-

---

* Local Rule 47.5.1 provides: "the publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

state plaintiff can utilize the "doing business" prong of Mississippi's long-arm statute to effect jurisdiction over a foreign defendant in Mississippi. The district court, on the basis of *Shewbrooks v. A.C. & S., Inc.*, 529 So. 2d 557 (Miss. 1988), dismissed the complaint for insufficient service of process and lack of personal jurisdiction. We affirm.

As the appellant, Esther Prince, concedes, every federal court that has considered this question has concluded that, in light of *Shewbrooks*, the above question of Mississippi law must be answered in the negative. Prior to the decision in *Shewbrooks*, we had held to the same effect in, e.g., *Smith v. DeWalt Prods. Corp.*, 743 F.2d 277, 279 (5th Cir. 1984).

Subsequently to the district court's judgment in the case *sub judice*, a panel of this court has reiterated the efficacy of *Smith*. In *Herrley v. Volkswagen of Am., Inc.*, 957 F.2d 216, 217 (5th Cir. 1992) (per curiam), we observed that "there has been no intervening change in Mississippi law since *Smith* was decided, [and therefore] our answer in this case is controlled by *Smith*." Bound by both *Smith* and *Herrley*, we AFFIRM the judgment of the district court.[1]

---

[1] The appellant urges us to certify this question to the Mississippi Supreme Court. We decline to do so because of the well-established line of federal authority answering the question at hand. *See also Herrley*, 957 F.2d at 219 (declining to certify the same question because the Mississippi Supreme Court, despite a delay of approximately six years, failed to answer the question, after accepting the certificate, in *Manookian v. A.H. Robins Co.*, 755 F.2d 1125 (5th Cir. 1985)).

APPENDIX D

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

JULY 1, 1992

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

FILED
JUL -3 1992

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 92-7060 - Prince v. F. Hoffman-LaRoche
(D.C. No. CA S91-0174-R)

The following action has been taken in the above case:

☒ AN EXTENSION OF TIME has been granted to and including
*July 6, 1992

☐ for filing appellant's/petitioner's brief.

☐ for filing appellee's/respondent's brief.

☐ for filing reply brief.

☒ for filing petition for rehearing. (Appellant)

☐

---

*MUST BE PHYSICALLY FILED IN OUR OFFICE BY DUE DATE.

☐ Motion to consolidate granted.

☐ Motion to supplement or correct the record granted.

☐ Motion for leave to file supplemental brief granted.

☐ Motion for leave to file brief *amicus curiae* is granted.

☐ Joint motion as to time for filing briefs granted.

☐ Order enclosed has been entered.

☐

GILBERT F. GANUCHEAU, Clerk

By: /s/ Jann Davis
Deputy Clerk

/jmd

cc: Mr. Mitchell Tyner
Mr. J. Carter Thompson

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-7060

FILED
JUL 21 1992

ESTHER PRINCE,

Plaintiff-Appellant,

versus

F. HOFFMAN-LA ROCHE & CO., L.C.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 05/28/92 , 5 Cir., 1992, ____F.2d____)

(July 21, 1992)

Before JOLLY, DAVIS and SMITH, Circuit Judges.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND
LOCAL RULES 41
FOR STAY OF
THE MANDATE

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

FILED
NOV 19 1992
OFFICE OF THE CLERK

No. 92-701

In The

Supreme Court of the United States

October Term, 1992

ESTHER PRINCE,

Petitioner,

vs.

HOFFMANN-LA ROCHE INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

J. CARTER THOMPSON, JR.
Counsel of Record
Attorney for Respondent
P.O. Box 22567
Jackson, Mississippi 39225-2567
(601) 948-5711

Of Counsel:

WILLIAM M. GAGE
BUTLER, SNOW, O'MARA,
STEVENS & CANNADA
17th Floor, Deposit Guaranty Plaza
P.O. Box 22567
Jackson, Mississippi 39225-2567
(601) 948-5711

2921
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

Respondent reformulates the Questions Presented as follows:

1. Does petitioner's challenge to the court of appeals' interpretation of state law present any issue of sufficient importance to warrant further review?

2. Was the court of appeals' interpretation of state law clearly erroneous or unreasonable?

LIST OF PARTIES

Petitioner is Esther Prince.

Respondent is Hoffmann-La Roche Inc. ("Roche"). Roche is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in Nutley, New Jersey. Roche is affiliated with Roche Holdings, Inc., a Delaware corporation and F. Hoffmann-La Roche Ltd. of Basel, Switzerland.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iii
Statute Involved	2
Statement of the Case	3
Summary of the Argument	4
Reasons for Denying the Writ	3
I. Prince's Challenge to the Court of Appeals' Interpretation of State Law Does Not Present Any Issue of Sufficient Importance to Warrant Further Review	5
II. The Court of Appeals' Interpretation of State Law Was Not Clearly Erroneous or Unreasonable	6
Conclusion	10

TABLE OF CITATIONS

Alexis v. A.C. and S., Inc., No. 91-69-404 (Cir. Ct. Hinds County, Miss.)	9

Contents

Page

Bishop v. Wood, 426 U.S. 341 (1976) 6

Breeland v. Hide-A-Way Lake, Inc., 585 F.2d 716 (5th Cir. 1978) 6

Butner v. United States, 440 U.S. 48 (1979) 5

Communist P rty v. Subversive Activities Control Bd., 367 U.S. 1 (1961) 8

Cycles, Ltd. v. W.J. Digby, Inc., 889 F.2d 612 (5th Cir. 1989) 8

Golden v. Cox Furniture Mfg. Co., Inc., 683 F.2d 115 (5th Cir. 1982) 6

Haring v. Prosise, 462 U.S. 306 (1983) 5

Herrley v. Volkswagen of America, Inc., 957 F.2d 216 (5th Cir. 1992) 6, 7

Huddleston v. Dwyer, 322 U.S. 232 (1944) 5

Lehman Brothers v. Schein, 416 U.S. 386 (1974) 8, 9

MacGregor v. State Mut. Life Assur. Co., 315 U.S. 280 (1942) 6

Manookian v. A.H. Robins Co., Inc., 580 F. Supp. 877 (S.D. Miss. 1984) 6

Contents

Page

Mills v. Dieco, Inc., 722 F. Supp. 296 (N.D. Miss. 1989) 6, 7

Propper v. Clark, 337 U.S. 472 (1949) 6

Schmid v. Roehm GMBH, 617 F. Supp. 655 (S.D. Miss. 1985) 6

Shewbrooks v. A.C. and S, Inc., 529 So. 2d 557 (Miss. 1988) 7, 8

Smith v. DeWalt Products Corp., 743 F.2d 277 (5th Cir. 1984) 6, 7

Southern Pacific Transportation Co. v. Fox, No. 89-CA-0381 (Miss. July 22, 1992) 7, 9

Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946) 5

White v. Williams, 132 So. 573 (Miss. 1931) 7

United States v. Durham Lumber Co., 363 U.S. 522 (1960) 6

Washington v. Norton Mfg., Inc., 588 F.2d 441 (5th Cir.), cert. denied, 442 U.S. 942 (1979) 5, 6

Statutes Cited:

Miss. Code Ann. § 1-1-21 (1972) 8

Contents

Page

Miss. Code Ann. § 13-3-57 (Supp. 1990) 2, 3

Miss. Code Ann. § 79-1-27 (1972) 7, 8

Rule Cited:

Fed. R. Civ. P. 12(b) (2) 3

Fed. R. Civ. P. 12(b) (5) 3

APPENDIX

Appendix A — Decision of the Supreme Court of Mississippi in *Southern Pacific Transportation Company v. Dudley Wayne Fox* 1a

No. 92-701

In the

Supreme Court of the United States

October Term, 1992

ESTHER PRINCE,

Petitioner,

vs.

HOFFMANN-LA ROCHE INC.,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent Hoffmann-La Roche Inc. ("Roche") respectfully requests that this Court deny petitioner Esther Prince's ("Prince") petition for writ of certiorari seeking review of the court of appeals' unanimous opinion in this case and its unanimous denial of Prince's petition for rehearing and suggestion for rehearing en banc.

STATUTE INVOLVED

The petition for writ of certiorari misstates the pertinent text of Miss. Code Ann. § 13-3-57 (Supp. 1990). The accurate wording of the pertinent text is reprinted below.

> § 13-3-57. Service when defendant is nonresident doing business in state – appointment of secretary of state as agent.
>
> Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of state of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their or its agent, servant or employee.

STATEMENT OF THE CASE

Invoking diversity jurisdiction, Prince, a Pennsylvania resident, filed this product liability action in Mississippi federal district court against Roche in 1991 to recover for injuries allegedly suffered as a result of her ingestion of Fansidar, an anti-malaria drug allegedly manufactured by Roche.[1] There is no allegation that Prince had any contact with Mississippi or that her cause of action arises out of Roche's actions in Mississippi. Indeed, Prince admits that she purchased the Fansidar from pharmacies in British Hong Kong and ingested the drug only while in the People's Republic of China and in the Commonwealth of Pennsylvania.

Prince attempted service of process on Roche by certified mail pursuant to the "doing business" provision of Mississippi's long-arm statute, Miss. Code Ann. § 13-3-57 (Supp. 1990). Roche, a New Jersey corporation, is not qualified to do business in Mississippi and does not have a registered agent for service of process in Mississippi.

Pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(5), Roche moved the district court to dismiss Prince's summons and complaint for lack of personal jurisdiction and insufficiency of service of process. Following an unbroken line of federal case law, the district court granted Roche's Rule 12(b)(2) motion to dismiss, holding that nonresident plaintiffs cannot utilize the "doing business" provision of section 13-3-57 to obtain personal jurisdiction over nonresident defendants. Prince's motion for reconsideration was denied by the district court. The Fifth Circuit Court of Appeals unanimously affirmed the district court in an

---

1. Although Roche is in the business of manufacturing and distributing pharmacuetical products, Roche established in the courts below, without contradiction, that it did not manufacture or distribute the Fansidar allegedly ingested by Prince.

unpublished opinion and unanimously denied Prince's petition for rehearing and suggestion for rehearing en banc.

SUMMARY OF THE ARGUMENT

Prince seeks review of the court of appeals' decision on a narrow issue of Mississippi statutory law: whether a nonresident plaintiff can utilize the "doing business" provision of Mississippi's long-arm statute to obtain personal jurisdiction over nonresident defendants. Because no constitutional issues or federal questions are involved, and since this Court ordinarily accepts state-law determinations by a court of appeals, this case does not warrant further review.

Review is likewise unnecessary because the court of appeals' decision was not clearly erroneous or unreasonable. Indeed, the court of appeals' decision followed an unbroken line of case law and clear legislative history. Likewise, the court of appeals' decision not to certify this case to the Mississippi Supreme Court is not a ground for review. The use of certification rests in the sound discretion of the court of appeals, and it cannot be said that the court of appeals abused its discretion in view of the vast body of case law and legislative history rejecting Prince's arguments.

REASONS FOR DENYING THE WRIT

I.

PRINCE'S CHALLENGE TO THE COURT OF APPEALS' INTERPRETATION OF STATE LAW DOES NOT PRESENT ANY ISSUE OF SUFFICIENT IMPORTANCE TO WARRANT FURTHER REVIEW

The decision of the court of appeals was based solely on its interpretation of Mississippi's long-arm statute, and there are no constitutional issues or federal questions involved. Accordingly, there is no issue of sufficient importance to warrant further review.

This Court has emphasized that "standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314, n. 8 (1983). As stated in *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944), "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." That is because "[t]he federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position [than this Court] to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 58 (1979); *see also Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-30 (1946).

This Court previously refused to grant certiorari in a case involving the same issue raised here. *See Washington v. Norton Mfg., Inc.*, 588 F.2d 441 (5th Cir.), *cert. denied*, 442 U.S. 942 (1979). No circumstance has arisen since *Washington* which would warrant this Court's review.

II.

THE COURT OF APPEALS' INTERPRETATION OF STATE LAW WAS NOT CLEARLY ERRONEOUS OR UNREASONABLE

In dealing with issues of state law that enter into the decisions of federal courts, this Court has expressed its reluctance to overrule decisions of lower federal courts skilled in the law of particular states unless their conclusions are shown to be clearly erroneous or unreasonable. *See United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960); *see also Propper v. Clark*, 337 U.S. 472, 486-87 (1949). It has been the practice of this Court to accept a reasonable construction of state law by the court of appeals "even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop v. Wood*, 426 U.S. 341, 346 (1976); *see also MacGregor v. State Mut. Life Assur. Co.*, 315 U.S. 280, 281 (1942).

In this case, review is unwarranted because the decision of the court below followed an unbroken line of Fifth Circuit and Mississippi federal district court decisions that have unanimously held that nonresident plaintiffs cannot utilize the "doing business" provision of Mississippi's long-arm statute to obtain personal jurisdiction over nonresident defendants. *See, e.g., Herrley v. Volkswagen of America, Inc.*, 957 F.2d 216, 217 (5th Cir. 1992) (per curiam); *Smith v. DeWalt Products Corp.*, 743 F.2d 277, 279 (5th Cir. 1984); *Golden v. Cox Furniture Mfg. Co., Inc.*, 683 F.2d 115, 117 (5th Cir. 1982); *Washington v. Norton Mfg., Inc.*, 588 F.2d 441, 444-45 (5th Cir.), *cert. denied*, 442 U.S. 942 (1979); *Breeland v. Hide-A-Way Lake, Inc.*, 585 F.2d 716, 719-21 (5th Cir. 1978); *Mills v. Dieco, Inc.*, 722 F. Supp. 296, 297 (N.D. Miss. 1989); *Schmid v. Roehm GMBH*, 617 F. Supp. 655, 657 (S.D. Miss. 1985); *Manookian v. A.H. Robins Co., Inc.*, 580 F. Supp. 877, 878 (S.D. Miss. 1984).

The legislative history of section 13-3-57 supports the Fifth Circuit's interpretation of the statute. In 1980, one year following this Court's denial of a petition for certiorari in *Washington*, the Mississippi Legislature amended the "tort" provision of section 13-3-57 to expressly permit its use by nonresidents but left the wording of the "doing business" provision intact. *See Smith v. DeWalt Products Corp.*, 743 F.2d 277, 279 (5th Cir. 1984). In passing up such a clear opportunity to correct any previous judicial misconstruction, the Mississippi Legislature was obviously content with pre-1980 federal court decisions prohibiting nonresident plaintiffs from utilizing the "doing business" provision of the long-arm statute. Indeed, because the "doing business" provision of the long-arm statute has been reenacted in the same form every year since 1980, it can be conclusively presumed that the federal judiciary has given the statute the precise interpretation the Mississippi Legislature intended. *See White v. Williams*, 132 So. 573, 575 (Miss. 1931).

Prince urges this Court to grant certiorari because the court of appeals allegedly failed in its *Erie* role to follow a 1988 Mississippi Supreme Court decision, *Shewbrooks v. A.C. and S., Inc.*, 529 So. 2d 557 (Miss. 1988), which in Prince's view, permits nonresident plaintiffs to obtain personal jurisdiction over nonresident defendants under the "doing business" provision of section 13-3-57. As Prince concedes, her interpretation of *Shewbrooks* has been offered and rejected by the Fifth Circuit and Mississippi's lower federal courts. *See, e.g., Herrley v. Volkswagen of America, Inc.*, 957 F.2d 216, 217 (5th Cir. 1992) (per curiam); *Mills v. Dieco, Inc.*, 722 F. Supp. 296, 298 (N.D. Miss. 1989).

Moreover, in *Southern Pacific Transportation Co. v. Fox*, No. 89-CA-0381 (Miss. July 22, 1992), *petition for reh'g filed* (reprinted in the Appendix hereto), the Mississippi Supreme Court concluded that Miss. Code Ann. § 79-1-27 (1972) (repealed effective Jan. 1, 1988), not the "doing business" provision of

section 13-3-57, formed the basis for the court's assertion of personal jurisdiction over the nonresident defendants in *Shewbrooks* (Appendix at 11a).[2] *Fox* lays to rest the argument that *Shewbrooks* enables nonresident plaintiffs to obtain personal jurisdiction over nonresident defendants pursuant to the "doing business" provision of section 13-3-57.

Prince also argues that the court of appeals' decision not to certify the narrow issue of state law involved here was an abuse of discretion. The use of certification to a state court in a given case rests in the sound discretion of the federal court. *See Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). As stated in *Schein*,

---

2. Prince may not obtain personal jurisdiction over Roche pursuant to section 79-1-27 because Prince's suit was filed more than three years after the repeal of the statute (Appendix at 11a); *Cycles, Ltd. v. W.J. Digby, Inc.*, 889 F.2d 612, 620 (5th Cir. 1989). Moreover, the question of whether Prince could serve process on Roche pursuant to section 79-1-27 is premature since Prince never attempted service of process on Roche pursuant to section 79-1-27. *See Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 71 (1961) (Court will not pass on significance of statutory provision in advance of efforts to apply the provision).

Prince also argues that Miss. Code Ann. § 1-1-21 (1972) enables her to rely on the repealed provisions of section 79-1-27 because under section 1-1-21 repealed statutes purportedly do not affect a cause of action accruing prior to the time of repeal. The very language of section 1-1-21 states that a plaintiff must commence her action *before* a statute is repealed if the plaintiff wants to rely on the repealed statute:

> The repeal of any statutory provisions by the Mississippi Code of 1972 shall not affect . . . *any suit or proceeding had or commenced in any civil case . . . previous to the time when such repeal shall take place* . . . .

Miss. Code Ann. § 1-1-21 (1972) (emphasis added).

"[i]f a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used." *Id.* at 395 (Rehnquist, J., concurring).

Resort to certification in this case would have been particularly inappropriate in view of the vast federal court authority and legislative history rejecting Prince's argument. Moreover, the opinion of the Mississippi Supreme Court in *Fox*, although not final because of the pending petition for rehearing, is the clearest indication of how Mississippi's highest court would rule on the issue Prince sought to certify. *Fox* validates the federal authority and legislative history relied upon by the court of appeals. Thus, the court of appeals' determination of state law, and its decision not to utilize certification, should not be reviewed.[3]

---

3. Prince also argues the court of appeals erred by refusing to delay her case pending the outcome of a case in one of Mississippi's trial courts, *Alexis v. A.C. and S., Inc.*, No. 91-69-404 (Cir. Ct. Hinds County, Miss.). This argument is without merit given the ruling of Mississippi's highest court in *Fox*.

CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

J. CARTER THOMPSON, JR.
Counsel of Record
Attorney for Respondent
P.O. Box 22567
Jackson, Mississippi 39225-2567
(601) 948-5711

Of Counsel:

WILLIAM M. GAGE
BUTLER, SNOW, O'MARA,
STEVENS & CANNADA
17th Floor, Deposit Guaranty Plaza
P.O. Box 22567
Jackson, Mississippi 39225-2567
(601) 948-5711

APPENDIX A — DECISION OF THE SUPREME COURT OF MISSISSIPPI IN *SOUTHERN PACIFIC TRANSPORTATION COMPANY V. DUDLEY WAYNE FOX*

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-CA-0381

SOUTHERN PACIFIC TRANSPORTATION COMPANY

v.

DUDLEY WAYNE FOX

EN BANC.

ROBERTSON, JUSTICE, FOR THE COURT:

I.

Today's appellant — a railroad whose tracks lie entirely west of the Mississippi — has been successfully sued on a Texas tort and appeals, asking that we hold there is nothing within the positive law of this state that renders the railroad amenable to suit here. On a fair reading of our non-resident amenability rules, the railroad is right.

We reverse.

II.

Dudley Wayne Fox, thirty-seven, is an adult resident citizen of Texas, residing at 1218 Crestridge, Ennis, Texas. In the spring of 1987, Fox was employed with Southern Pacific Transportation Company, a railroad corporation having its principal place of

business in Lafayette, Louisiana, but not qualified to do business in Mississippi. Fox was the Plaintiff below and is the Appellee here. Southern Pacific was the Defendant below and is the Appellant here.

On April 19, 1987, Fox was serving as a railroad brakeman and was working in Southern Pacific's railroad yards in Hearne, Texas. Late that afternoon, Fox discovered an open plug door on one of the rail cars. After reporting the fact, Fox aided and assisted Southern Pacific's trainmaster, R.A. McCall, in an effort to close the plug door on boxcar No. SP6971186 with the use of a "come-along." During this process, the come-along slipped and struck Fox on his left hand, causing severe and disabling personal injuries.

Fox is a total Texan. There is no suggestion he has ever had anything to do with Mississippi prior to this action. Soon after his accident, Fox engaged the services of Herschel L. Hobson, attorney, of Port Arthur, Texas. On May 13, 1988, Fox invoked rights afforded him under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51 et seq., and filed his complaint against Southern Pacific in the District Court of Jefferson County, Fifty-Eighth Judicial District, Texas, Docket No. A129136. Without dispute, process was served on Southern Pacific's registered agent in Houston, Texas.

For reasons not made apparent, on July 12, 1988, Fox, having employed Vicksburg counsel, filed an almost identical complaint in the Circuit Court of Warren County, Mississippi, again naming Southern Pacific as defendant and invoking his FELA rights.[1]

---

1. We have carefully compared the verbiage of Fox's original Texas complaint with his later-filed Mississippi complaint. We note four differences. In paragraph I of the Texas complaint, he names the Southern Pacific Company as defendant and

(Cont'd)

Appendix A

On November 23, 1988, the District Court in Beaumont, Texas, dismissed Fox's Texas action without prejudice.

Southern Pacific answered and as its "First Defense" denied that it was amenable to personal jurisdiction in the State of Mississippi. Southern Pacific thereupon filed a separate motion to dismiss under Rule 12(b)(2), Miss.R.Civ.P., and the matter of Southern Pacific's amenability to suit in Mississippi thereafter became a principal subject of pre-trial litigation. On November 28, 1988, the Circuit Court entered its order denying the motion to dismiss. The matter proceeded to trial in the Circuit Court of Warren County, and in due course the jury returned a verdict in favor of Fox and against Southern Pacific in the amount of $200,000.00. Final judgment was entered thereon.

Southern Pacific now appeals to this Court.

(Cont'd)
recites its registered agent and office in Houston, Texas, while in the Mississippi complaint he gives the name and address of the company's agent at its principal office in Lafayette, Louisiana. In paragraph II of each complaint, Fox describes the nature of Southern Pacific's interstate railroad business and asserts coverage under the FELA, the only distinction between the two complaints being that, in the Mississippi complaint, he adds the conclusory phrase that Southern Pacific "was doing business in the State of Mississippi." In paragraphs VI and VII of his Texas complaint, Fox alleges damages in general language, while the comparable paragraphs of his Mississippi complaint claim damages in specific dollar amounts, having in mind, no doubt, our rules of practice. *See*, Rule 54(c), Miss.R.Civ.P. Fourth, in his Texas complaint Fox invokes a unique Texas rule on pre-judgment interest in personal injury cases. Beyond this, the two complaints are verbatim identical.

Appendix A

III.

A.

Southern Pacific presents but a single issue.[2] It claims the Circuit Court erred when it denied the Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. Southern Pacific argues this state has no law that affirmatively provides non-resident corporations, factually situated as is Southern Pacific, are amenable to suit in here in tort actions such as this.

For clarity, the issue is wholly independent of constitutional due process concerns, the familiar soundbite expressions of which are "minimum contacts" and "fair play and substantial justice" flowing from *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and progeny. This due process shield — "immunity" might be a more accurate term, *Administrators of* the *Tulane Educational Fund v. Cooley*, 462 So. 2d 696, 702 (Miss. 1984), is conceptually and legally distinct from today's issue and, indeed, is irrelevant thereto.[3]

All agree that Southern Pacific's tracks lie exclusively west of the Mississippi River. From time to time, Southern Pacific undertakes for hire the transportation of goods to and from points east of the Mississippi. In that connection it has business

---

2. No venue issues such as those present in *Missouri Pacific Railroad Co. v. Tircuit*, 554 So. 2d 878 (Miss. 1989), have been preserved or tendered.

3. In *McDaniel v. Ritter*, 556 So.2d 303,307 n. 4 (Miss. 1989), we listed the four distinct predicates that "must be established" before a court "has authority to make an adjudication affecting the important rights of a nonresident." Today's issue is predicate (3), although the phrase "state statutory law" there mentioned is a bit too narrow. *See, e.g., Jones v. Chandler*, 592 So.2d 966, 971 (Miss. 1991); *Chenier v. Chenier*, 573 So.2d 669, 702 (Miss. 1990).

arrangements with Mid-South Railroad Company, Illinois Central Gulf Railroad Company, and Burlington Northern Railroad Company, each of which, from time to time, receives eastbound shipments of cargo from Southern Pacific and transports those in interstate commerce across this state or delivers west-bound cargo to Southern Pacific after a trans-Mississippi shipment. Moreover, it appears Southern Pacific owns and operates a trucking company which transports cargo in interstate commerce and, from time to time, carries freight for hire through and across this state. We find in the record a list of forty-two companies in this state with business relationships with Southern Pacific, generally by way of contracts of carriage. For example, the Southern Pacific regularly carries freight for Batesville Casket Company, domiciled in Panola County, Mississippi. Assorted other business arrangements with Mississippi firms are shown, including a law firm in Greenville, Mississippi, but what is important is not a word in the record suggests Dudley Wayne Fox or his accident in the railyard at Hearne, Texas, have even the slightest connection with this state or with any business Southern Pacific does here.

Southern Pacific has not qualified to do business in Mississippi and has no agent for process in this state, nor does the record reflect the name of any other officer, agent, employee, or personnel within this state. In spite of this general talk about business activities with Mississippi firms, Fox's proof in no way suggests that there is a single warm-bodied human being in this state upon whom process might be served effectively, nor that there is a single identifiable fixed asset here that might be attached.

B.

The parties' principal battleground is our most familiar long-arm statute, Miss. Code Ann. § 13-3-57 (Supp. 1988). That statute is an affirmative declaration of conditions upon which non-

residents such as Southern Pacific may be held amenable to suit in this state. Referring to non-resident corporations not qualified to do business here, it provides amenability for those

> who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or non-resident of this state, or who shall do any business or perform any character of work or service in this state,. . . .

The statute then provides that any non-resident coming within any of these three descriptions — contract, tort, or doing business —

> shall by such act or acts be deemed to be doing business in Mississippi.

Of importance, such "act or acts" renders the non-resident amenable to suit here only

> in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto,. . . .

A nexus requirement has always been in our long arm statute, and a bit of archeology makes this apparent. Prior to 1964, it was settled law that our "doing business" long arm statute was limited.

> The cause of action must arise from, or be connected with such act or transaction.

Mladinich v. Kohn, 250 Miss. 138, 148, 164 So. 2d 785, 790 (1964). In 1964 the legislature acted, Miss. Laws ch. 320 (1964), and added the "tort" and "contract" grounds for non-resident amenability to suit here. It made no substantive change in the *Mladinich* nexus limitation on "doing business" amenability.[4] In 1978 and 1980 the statute was further amended, but the nexus test quoted above was re-enacted verbatim. Miss. Laws ch. 378, § 1 (1978); and Miss. Laws ch. 437, § 1 (1980). All who looked at the point have seen the successive generations of the act continuing the nexus rule.[5] *See Applewhite v. Metro*, 875 F.2d 491, 494 (5th Cir.

---

4. Obviously a suit arising from a contract made here, or a tort committed here, has a nexus with this state.

5. All of this has now changed. Effective July 1, 1991, the legislature amended Section 13-3-57 and repealed the nexus test. Miss. Laws ch. 573, § 98 (1991). The statute now reads:

> Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state. *Service of summons and process upon the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure.* [Emphasis supplied]

The amended statute applies prospectively to actions commenced after its effective date. *Mladinich v. Kohn*, 186 So.2d 481 (Miss. 1966). It has no effect on Fox's suit which he filed on July 12, 1988.

1989); *Rittenhouse v. Mabry*, 832 F. 2d 1380, 1385 (5th Cir. 1987); *Smith v. DeWalt Products Corp.*, 743 F.2d 277, 279 (5th Cir. 1984); *Mills v. Dieco, Inc.*, 722 F.Supp. 296, 298 (N.D. Miss. 1989); *Thompson v. F.W. Woolworth Co.*, 508 F.Supp. 522, 523 (N.D. Miss. 1981).

C.

Fox concedes he is not within the contract or tort prongs of Section 13-3-57. Nothing in the record remotely suggests that his action arises out of a contract in this state. He sues Southern Pacific in tort but makes no claim that Southern Pacific has committed this "tort in whole or in part in this state."

For his third strike, Fox presses the point that Southern Pacific may well have done "any business or perform[ed] any character of work or service in this state." Southern Pacific quickly replies that, though this be so, the nexus test is not met. The fact Southern Pacific may have done business in this state does not render it amenable to suit under Section 13-3-57 unless Fox's action "accrued . . . from such . . . [business] . . . , or as an incident thereto, . . ."

We had this language before us in *McDaniel* v. *Ritter*, 556 So.2d 303 (Miss. 1989), and said:

> The long-arm statute requires no direct nexus to the non-resident's business done here, only that the claim be incident thereto. The statute thus requires far less than that the liability generating conduct have occurred in Mississippi.

McDaniel, 556 So.2d at 309. *McDaniel* was a wrongful death

action brought on behalf of survivors of a businessman/ passenger killed in a small aircraft crash in Missouri. Defendant's decedent lived in Mississippi and was an officer, director and shareholder of a Mississippi corporation which did substantial business in Mississippi and on whose behalf defendant's decedent and plaintiff's decedent were acting in connection with their fatal flight to Missouri. On those facts, we held

> the Plaintiffs Ritter's claim to have arisen out of facts sufficiently incident to business done by Speaks in Mississippi that Speaks' estate is amenable to suit here under Section 13-3-57.

McDaniel, 556 So.2d at 309.

Today's facts are in sharp contrast with *McDaniel*. There is no suggestion in the record of any aspect of Fox's claim having any connection with Southern Pacific's business activities in this state. Indeed, at argument, Fox's counsel virtually conceded that, if we were to hold Southern Pacific amenable to suit here on the present claim, on grounds it is related to Southern Pacific's business done in interstate commerce, we might as well get ready to host the litigation of every FELA case Southern Pacific is ever called to defend, no matter how removed the plaintiff or the lex loci may be from Mississippi. Neither in fact nor in law did Fox's action accrue from Southern Pacific's business in Mississippi, nor was it an incident thereto.[6] See, *Herrley* v. *Volkswagen of America, Inc.*, 598

---

6. Southern Pacific claims as well a non-resident plaintiff may not pursue "doing business" non-resident defendants under the statute's third prong. *See, Smith v. DeWalt Products Corp.*, 743 F.2d 277, 279 (5th Cir. 1984); *Washington v. Norton Mfg., Inc.*, 588 F.2d 441, 444-55 (5th Cir. 1979); *Mills v. Dieco, Inc.*, 722 F.Supp. 296, 297 (N.D. Miss. 1989). In view of the disposition we make of the nexus/incident thereto issue, we need not address the point.

F.Supp. 690, 692 (S.D. Miss. 1984); *Thompson v. F.W. Woolworth Co.*, 508 F.Supp. 522, 523 (N.D. Miss. 1981).

D.

Sensing the frailty of his judgment under Section 13-3-57, standing alone, Fox retorts with law from other sources. First, he cites a series of cases in the United States Supreme Court and in this Court and says they hold a causal nexus is not necessary before we may hear a suit against a non-resident corporation. *See, e.g., Helicopters Nacionales de Columbia, S.A. v. Hall, 466 U.S.* 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404, 411 (1984); *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 418, 96 L. Ed. 485 (1952); *Williams v. Taylor Machinery, Inc.*, 529 So.2d 606, 608 (Miss. 1988); *Administrators of the Tulane Educational Fund v. Cooley*, 462 So.2d 696, 703 (Miss. 1984). But these are all due process cases.[7] The question is not whether Mississippi *could* constitutionally subject Southern Pacific to personal jurisdiction, but whether it *has, by* statute or otherwise. *Jones v. Chandler*, 592 So.2d at 971; *Chenier v. Chenier*, 573 So.2d at 702. Looking at Section 13-3-57 standing alone, we have little difficulty answering in the negative.

E.

Fox seeks safe haven in *Shewbrooks* v. *A.C.&S., Inc.*, 529 So.2d 557 (Miss. 1988), but that case is of little aid. The Court begins

> There is no serious contention on appeal that the Circuit Court lacked personal jurisdiction of the defendants, all of which do business in

7. See *McDaniel's* predicate (I). *McDaniel*, 556 So.2d at 307 n.4.

> Mississippi and are subject to process in this state.

Shewbrooks, 529 So.2d at 559. We are there given no details of the sort that would be necessary to see if this case is legally analogous.

Shewbrooks did hold non-resident, non-qualified firms amenable to suit here. The holding made perfect sense at the time, for our statute books then contained Miss. Code Ann. § 79-1-27 (1972), which read:

> Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, *whether the cause of action accrued in this state or not.* [Emphasis supplied]

Effective January 1, 1988, the legislature repealed Section 79-1-27. See Miss. Laws, ch. 486, § 17.05 (1987). Fox did not file the present civil action until some six and a half months later — on July 12, 1988 — to be exact. The repeal of Section 79-1-27 strips *Williams v. Taylor Machinery, Inc.*, 529 So.2d at 608, and *Arrow Food Distributors, Inc. v.* Love, 361 So.2d 324, 327 (Miss. 1978), and *Aycock v. Louisiana Aircraft, Inc.*, 617 So.2d 432, 434 (5th Cir. 1980), of any precedential or persuasive effect as well.

F.

Independently, Fox marshalls *Administrators of the Tulane Educational Fund v. Cooley, supra*, and *Arrow Food Distributors, Inc. v. Love, supra.* It is true that each of these actions allow a plaintiff to proceed *quasi in rem* against the property of a non-

resident defendant, the underlying claim in each being tort actions that accrued in a foreign state unrelated to the non-resident defendant's Mississippi activities. *Tulane* and *Arrow Food* were both chancery attachment actions, *see* Miss. Code Ann. § 11-31-1, et seq. (Supp. 1991). In each, the non-resident had property or effects in this state which were, in fact, seized in this state. Dudley Wayne Fox does not so proceed. The record is sprinkled with hints that Southern Pacific may have been subject to an attachment action, but no hint that Fox has in fact attached, seized or even specifically identified in this state anything belonging to Southern Pacific.

G.

Fox invokes two increasingly familiar provisions of our state constitution. Miss. Const. Art. 3, § 24 (1890) reads:

> All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.

Miss. Const. Art. 3, § 25 (1890) follows with:

> No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both.

Fox argues that as a Texan and a non-resident of Mississippi, he enjoys the protection of Sections 24 and 25, and in this he is certainly correct. *Tri-State Transit Co. of Louisville v. Mundy*, 194 Miss. 23, 12 So.2d 920 (1943); *Pullman Palace Car v. Lawrence*, 74 Miss. 782, 22 So. 53 (1897); *Chicago, St. Louis & New York*

Railroad Co. v. Moss and Co., 60 Miss. 641 (1882). But none of this carries us far, for nothing in Sections 24 and 25 strips a non-resident defendant of his right to question personal jurisdiction and have his question resolved by a fair application of this state's positive prescriptions which non-residents shall be amenable to suit in this state and on what sort of claims.

The same may be said of Fox's resort to Miss. Const. Art. 7, § 193 (1890), protecting railroad employees' right to sue. Again, the fact that Fox is a Texan suing on a Texas tort is not what has his judgment at risk. That stems from the fact that he has yet to point to any rule of law that renders Southern Pacific amenable to this suit in this state. Not one word in section 193 directly or indirectly is of aid to him.

H.

Finally, Fox invokes the FELA itself but misreads the act. The FELA provides a regime of concurrent federal and state jurisdiction, 45 U.S.C. § 56, but this refers to subject matter jurisdiction. As a matter of federal law, an injured railroad worker may sue in a court of a state of otherwise competent jurisdiction and may thereupon fully litigate his claims. *See, e.g.*, Illinois Central Gulf Railroad Co. v. Willie Mae Gibbs, No. 89-CA-264, (dec. May 13, 1992) (not yet reported); *Lambert v. Illinois Central Gulf Railroad Co.*, 547 So.2d 50 (Miss. 1989); *Illinois Central Railroad Co. v. Coussens*, 223 Miss. 103, 77 So.2d 818 (1955). Nothing in the act addresses the matter of personal jurisdiction in the state court. The language Fox notes in Section 56 speaks to venue of actions in federal courts, not personal jurisdiction in state courts. *Baltimore and Ohio Railroad Co. v. Kepner*, 314 U.S. 44, 62 S.Ct. 6, 9, 14, 86 L.Ed. 28 (1941); *Douglas v. New York, N.H.R. Co.*, 279 U.S. 377, 49 S.Ct. 355, 75 L. Ed. 747 (1929). It is certainly true that under the FELA, trial by jury is part of the remedy which

Appendix A

Congress has afforded injured railroad workers, *Boeing Co. v. Shipman*, 411 F.2d 365, 371 (5th Cir. 1969), but not necessarily a Warren County, Mississippi, jury.

REVERSED AND RENDERED.

ROY NOBLE LEE, C.J., PRATHER, SULLIVAN, AND PITTMAN, JJ., CONCUR. DAN M. LEE, P.J., DISSENTS WITH WRITTEN OPINION JOINED BY HAWKINS, P.J., AND McRAE, J.; BANKS, J., NOT PARTICIPATING.

Appendix A

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-CA-381

Southern Pacific Transportation Company

v.

Dudley Wayne Fox

DAN M. LEE, PRESIDING JUSTICE, DISSENTING:

I believe Fox had standing to bring the suit, and in so stating I am relying upon *Shewbrooks v. A.C.&S., Inc.*, 529 So.2d 557 (Miss. 1988), *Arrow Food Distributors, Inc. v. Love*, 361 So. 2d 324 (Miss. 1978), and *Aycock v. Louisiana Aircraft, Inc.*, 617 F.2d 432 (5th Cir. 1980).

In *Shewbrooks*, it is stated:

> There is no serious contention on appeal that the circuit court lacked personal jurisdiction of the defendants, all of which do business in Mississippi and are subject to process in this state. *This ground of dismissal needs little discussion.*
>
> The fact that a plaintiff and a defendant are non-residents of a state in a transitory cause of action which accrued in another state does not, in and of itself, deprive a court of lawful authority (i.e., "jurisdiction") to hear the case,

and *this is universally recognized in all courts.*

> This familiar principle of law was settled in this state long ago in *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53 (1897). . . ."

Shewbrooks at 559 (emphasis added).

Common Law Allowed This Suit

The majority would have us believe that the repeal of sec. 79-1-27 deprives our state courts of jurisdiction in cases such as this one, notwithstanding the fact that the repealed statute is not even mentioned in *Shewbrooks*. The predecessor to sec. 79-1-27 was enacted in 1906, and was not in existence when *Pullman Palace* was decided. The only way to ascertain the effect of the repeal of sec. 79-1-27 is to look at the state of the common law prior to the enactment of the statute. Hence we may look to *Pullman* to see what the common law was prior to enactment of sec. 79-1-27:

> [W]e had supposed there was, in our own state, no ground left for dispute that, in transitory actions, whether in tort or in contract, *our courts were wide open to any suitor, resident or nonresident, against his adversary, whether resident or nonresident, whether a natural person or an artificial one, regardless of where the right of action occurred, if only the courts had jurisdiction of the subject-matter, and could obtain jurisdiction of the party*, either a voluntary appearance, or by service of process. We are aware that there is some divergence of opinion

on this subject between the courts of last resort in this country, and that apparent authority can be found for holding that a foreign corporation resident in one state may not be sued in another state by a resident of the first state on a cause of action arising in the first state. But even these cases will be found to be governed by the peculiar statutes of the state declining to take jurisdiction, or that the refusal to take jurisdiction rested upon some unusual circumstances which deterred the court from entertaining the suit, or because of a supposed distinction between statutory rights and common law rights. But in many states, and amongst them our own, the rule we first announced has been firmly established by repeated adjudications. The rule was first expressly declared in our own state in the case of the New *Orleans, Jackson, & Great Northern Railroad Co. v. Wallace,* 50 Miss. 244 [1874]. That was an action brought by Wallace against the railroad company, a foreign corporation, in one of the courts of this state, for the recovery of damages for injuries sustained by him in a collision of trains in the State of Louisiana. The court said then, on this very question: "Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation, and cannot migrate to another state. But they are liable to be sued, like natural persons, in transitory actions arising *ex contractu or ex delicto,* in any state where legal process can be had. . . . In transitory actions, foreign private

> corporations, like natural persons, may be sued *anywhere where the court can obtain jurisdiction of the corporation* either by legal service of process or by its appearance by attorney." *Whether Wallace was a citizen of or resident of Mississippi nowhere appears in the reported case, and that fact must have been thought by the court to be wholly immaterial to a proper determination of the question of the amenability of a foreign corporation, for a wrong done in a foreign state, to the jurisdiction of our courts.*

Pullman Palace at 796-97 (emphasis added).

Thus we can easily see that prior to enactment of the statute, a lawsuit such as the one brought by Fox in the instant case was permissible in Mississippi. From there it is a short hop to reach the conclusion that the statute was not necessary, and therefore the repeal of the statute does not affect Fox's right to sue in the courts of our state.

Nowhere in *Shewbrooks* is sec. 79-1-29 even mentioned. This court did not feel that the statute was necessary for jurisdiction over the foreign corporation, for the reason that the corporation was doing business in our state, and should rightfully be subject to our jurisdiction.

Thus we can conclude that the repeal of sec. 79-1-27 does not affect Fox's right to bring his action to our courts.

The majority would have us distinguish *Aycock* and *Arrow Food* because the plaintiffs in those cases were all Mississippi

residents. However, the residence of the plaintiff does not determine the court's exercise of jurisdiction; we already know that the statute relied upon by the majority was not necessary for jurisdiction over a foreign corporation doing business in our state, and thus the repeal of the unnecessary statute should not make any difference.

This is especially evident in light of the emphasized portion of *Pullman Palace* quoted above and in light of *Wallace* cited therein. Indeed, it wasn't even noted which state the plaintiff Wallace resided in the court not thinking enough of this issue to even mention it in its reported decision.

The failure to mention the residence of the plaintiff was the norm, and not the exception, in the early Mississippi decisions on the question of jurisdiction over a foreign corporation found to actually be doing business within the borders of our state. Besides *Pullman Palace* and *Wallace*, the cases of *Chicago, St. Louis and New Orleans Railroad Co. v. Doyle*, 60 Miss. 977 (1883), and *McMaster v. Illinois Central Railroad Co.*, 65 Miss. 264 (1887) also dealt with transitory causes of action brought in the courts of this state against railroads for damages allegedly suffered in other states, and *in neither of the reported decisions is the plaintiff's state of residence even mentioned.* Thus we can readily see that Mississippi has traditionally enforced its jurisdiction over foreign corporations found to be doing business in our state, regardless of the residence of the plaintiff and regardless of the location of the cause of action.

Cases which predate the repealed statute apply the same standard of law that this court applied in *Shewbrooks*, and I conclude that this state has jurisdiction over the case at bar unless we are today prepared to overrule *Shewbrooks, Pullman Palace,*

Wallace, Doyle, and McMaster. This I am not prepared to do.

International Shoe Controls

Thus I would have Mississippi remain within the ranks of the majority of the states in interpreting our long-arm statute to reach the limits allowed by the constitution, 27 A.L.R.3d 397, 403, 418, as was established in *International Shoe v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed. 95 (1945).[1] Indeed, in other contexts, we have already done so.

In *Jones v. Chandler,* 592 So. 2d 966 (Miss. 1991), the plaintiff was an unwed mother who filed a paternity and support action against a Tennessee resident, alleging that he was the father of her child. The author of the majority in the case *sub judice* (Justice James L. Robertson), writing for this court, first determined that our long-arm statute, sec. 13-3-57, could be used to compel the defendant to appear in Mississippi and defend the action:

> . . . Section 13-3-57's catchall — "do any business or perform any character of work or service in this state" — is so broad that it belies any suggestion it be limited to commercial activities.

---

1. *See, Shewbrooks v. A.C.&S., Inc.*, 529 So. 2d 557, 565, wherein Justice Hawkins wrote: "The only restriction placed on states in hearing out-of-state claims is the Constitutional limit placed on our long-arm statute. So long as an out-of-state litigant has enough minimum contacts in Mississippi so that the maintenance of a suit "does not offend the traditional notions of fair play and substantial justice," our courts have the power to hear a suit. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Administrators of Tulane Educational Fund v. Cooley,* 462 So. 2d 696 (Miss. 1984). So long as the case falls within the prescribed period of when a suit can be brought, our courts must hear the action."

Appendix A

> The states' legal long arms commonly take statutory form, *but this does not have to be*. It is a fact of history that state courts once took an unfortunately restrictive view of their powers over non-residents. See *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1877). Recognizing that the interests of their citizens required more, the legislatures of the several states stepped forward and provided what are commonly known as long-arm statutes, *but there is no reason on principle or power why the courts could not have done the same thing. There is no reason why the existence of these long-arm statutes should be taken to include the courts' common law lawmaking powers* absent, of course, legislative expression to the contrary. To suggest that long-arm amenability rules may be only statutory in form and legislative in source is to confuse the familiar with the necessary and thus fall into fallacy.
>
> *Jones v. Chandler*, 592 So. 2d at 971 (emphasis added).

The author of today's majority then cited *Chenier* v. *Chenier*, 573 So. 2d 699, 702 (Miss. 1990) for the proposition that our courts may exercise jurisdiction over non-residents, within the confines of *International Shoe*, absent any specific legislative directive to the contrary.

As authority for this proposition, he wrote that *Chenier* "specifically accepts that the legal rule rendering the non-resident amenable to suit here *is non-legislative in source and non-statutory in form*." *Chandler* at 971 (quoting *Chenier*, 573 So. 2d at 702) (emphasis added).

Chandler then goes on to say:

> . . .We find power in the public policy expression in the last paragraph of our general long-arm statute, Miss. Code Ann. sec. 13-3-57. . . .

Chandler, 592 So. 2d at 971.

Likewise we find power in sec. 13-3-57 (Supp. 1991), wherein it is stated that "any non-resident person, general or limited partnership, or any foreign or other corporation . . . who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state." (Emphasis added). Thus the statute on its face would authorize jurisdiction over any person or corporation with the minimum *International Shoe* contacts within this state. To arbitrarily say that this court has the authority to hale an (alleged) father into our court system against his will, but that we do not have the authority to haul a nonresident corporation into court here, when the nonresident corporation has more than sufficient minimum contacts so as not to offend the traditional notions of fair play and substantial justice, would be hypocritical.

I have also concluded that our court does not have any problems under the *International Shoe* test because Southern Pacific does do substantial business in Mississippi, could reasonably expect to be haled into court here, and such action would not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington.*

Southern Pacific transports cargo across Mississippi in trains

and in trucks, and the company has business relationships with at least 42 Mississippi companies, firms with which it regularly does business for a profit. This is an adequate connection between the defendant and the state for our courts to exercise jurisdiction over Southern Pacific. *International Shoe, supra.*

Forum Non Conveniens Aspect

Just as the defendants in *Shewbrooks, supra,* did not want to tote fair with the plaintiff, neither did Southern Pacific Transportation Company in this case. Let me demonstrate.

In *Shewbrooks,* after the statute of limitations had expired in New Jersey and Pennsylvania, the plaintiff came to Mississippi and filed his suit. Now the appropriate and obvious thing for the defendants to have done there was to move for a dismissal of the cause, in order that it could be heard in either Pennsylvania or New Jersey, on the principle of *forum non conveniens.* But they did not want to do that. Why? There is another rule of law which says that before one state will dismiss a complaint under the *forums non conveniens* doctrine, if the case is barred by the statute of limitations in the more appropriate forum, the defendant must agree to waive this defense. The defendants in *Shewbrooks* did not want to waive this defense of statute of limitations, and so they did not move for a dismissal on the ground of *forum non conveniens.* Instead, they claimed Mississippi did not have "jurisdiction" to hear the case.

In this case Southern Pacific Transportation Company is obviously doing business in Mississippi, albeit in a modest way. Legally, this corporation is "in" Mississippi just as much as an individual living here.

Appendix A

Southern Pacific could easily have moved for a dismissal on the grounds of *forum non conveniens*. If the case was not barred by the Texas statute of limitations (or, if barred, if Southern Pacific was willing to waive the defense), and the judge refused to dismiss in order that the case could be tried in Texas, I would be the first to say it was an abuse of discretion, and reverse.

The question then arises, why didn't Southern Pacific move for a dismissal on the ground of *forum non conveniens?* They didn't. Instead, they claim the courts of this state have no authority whatever to hear this case. That simply is not the law.

> The majority opinion tells us ominously:
>
> > [I]f we hold Southern Pacific amenable to suit here on the present claim, on grounds it is related to Southern Pacific's business done in interstate commerce, we might as well get ready to host the litigation on every FELA case Southern Pacific is ever called to defend, no matter how removed the plaintiff or the *lex loci* may be from Mississippi.

This simply is incorrect. It totally ignores the fact that the courts of this state have the authority to dismiss any case on the ground of *forum non conveniens*. This is the clear and simple remedy for any defendant who feels he is being sued in the wrong place.

If we follow the rationale of the majority opinion, Fox could not bring this suit in Mississippi against the defendant even though he had moved to Mississippi. Do we want this? If we follow this rationale, the same would hold true if this suit was against General Motors or IBM. Do we want this?

Appendix A

I would hold that, by doing business in this state, Southern Pacific subjected itself to suit in the courts of this state, whether the cause of action accrued in Mississippi or Timbuktoo. This is clearly settled law.

For these reasons I respectfully dissent.

HAWKINS, P. J., McRAE, J. JOIN THIS OPINION.